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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. ~~75~~-1663

MEL FRIEDMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OF COUNSEL:

JIM MERZ, ESQ.
304 Investors Capital Building
217 North Harvey
Oklahoma City, Oklahoma 73102
(405) 321-2367

ROBERT EUGENE SMITH, ESQ.
GILBERT H. DEITCH, ESQ.
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Attorneys for Petitioner

The Paul M. Harrod Company, Baltimore, Maryland 21234

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MEL FRIEDMAN,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on January 16, 1976.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is not yet reported; a copy is set forth in Appendix "A" hereto. A copy of the Order denying Rehearing is set forth in Appendix "B" hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 16, 1976. A Petition for Rehearing was timely filed and denied on March 15, 1976. On March 30, 1976, Mr. Justice White granted an extension of time to and including May 14, 1976, within which to file this Petition. This Court's jurisdiction is invoked under Title 28, United States Code §1254(1).

QUESTIONS PRESENTED

1. Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in *Miller v. California* and its companion cases are entitled to jury instructions which encompass the benefits of the *Roth-Memoirs* obscenity formulation prevailing at the time of their conduct?

2. Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in *Miller v. California* and its companion cases are entitled to introduce evidence relevant to whether the publications charged are "utterly without redeeming social value" as prescribed by the *Roth-Memoirs* obscenity standard?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law... abridging the freedom of speech, or of the press..."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall... be deprived of life, liberty, or property, without due process of law..."

STATEMENT

Petitioner, along with Peachtree National Distributors, Inc., was charged with knowingly transporting obscene materials in interstate commerce in violation of Title 18, United States Code §1465. The charge was predicated upon the transportation on or about December 10, 1970, of an allegedly obscene book entitled "The Animal Lovers." Both Petitioner and the Corporation were tried before a jury in November 1971. The Court instructed the jury in accordance with the *Roth-Memoirs* obscenity formulation promulgated in *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Both defendants were convicted and both appealed.

While the convictions were pending before the United States Court of Appeals for the Tenth Circuit, this Court handed down its decision in *Miller v. California*, 413 U.S. 15 (1973) and its companion cases. In light of the new decision, the Court of Appeals below remanded the case to the trial court for reconsideration in light of *Miller, supra. United States v.*

Friedman, 488 F.2d 1141 (10th Cir. 1973). In accordance with the remand, the District Court ordered a retrial of the matter. Prior to that retrial Peachtree National Distributors pleaded guilty. Petitioner proceeded to a retrial before a jury.

During the course of the retrial, the District Court held that only the *Miller* obscenity standards were applicable. Testimony relating to elements of the *Roth-Memoirs* standard was therefore refused. Likewise, the jury was instructed solely on the obscenity formulation set forth in *Miller*.

Petitioner objected, contending that, since the conduct which formed the basis for his prosecution occurred prior to *Miller*, he was entitled to the benefits of the *Roth-Memoirs* standards. In accordance therewith, he contended that any "reconsideration" in light of *Miller* should have given him only the benefits rather than the detriments of the change in the law wrought by *Miller*. Petitioner therefore objected that the District Court was prejudicing him by subjecting him to the detriments of *Miller* in his trial for pre-*Miller* conduct.

On appeal, the conviction was affirmed. The Court of Appeals rejected Petitioner's claim of entitlement to the *Roth-Memoirs* standards.

REASONS FOR GRANTING THE WRIT

I.

THE QUESTION PRESENTED HEREIN IS IDENTICAL TO THE QUESTION ALREADY BEFORE THIS COURT IN *MARKS, ET AL., V. UNITED STATES*, NO. 75-708, CERTIORARI GRANTED MARCH 1, 1976.

On March 1, 1976 this Court granted a Petition for Writ of Certiorari in *Marks v. United States*, No. 75-708. Like the instant case, *Marks* involves an obscenity prosecution predicated upon conduct occurring prior to this Court's decision in *Miller v. California*, 413 U.S. 15 (1973). Also like the instant case, *Marks* involves a trial which proceeded solely upon the *Miller* obscenity formulation. In light of this, the first issue before this Court in *Marks* is:

> "Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in *Miller v. California* and its companion cases are entitled to jury instructions founded upon the *Roth-Memoirs* obscenity formulation prevailing at the time of their conduct?" Petition for Writ of Certiorari, at 2.

That identical question is presented by Petitioner herein. Like the Petitioners in *Marks*, Petitioner here was subjected to the detriments as well as the benefits of the change in the law brought about by *Miller*. In *Marks* the issue was presented only with respect to jury instructions. In this case, Petitioner suffered the detriments of *Miller* not only with respect to jury instructions, but also with respect to the conduct of the trial.

During the course of the trial, Petitioner offered evidence as to whether the publication involved was "utterly without redeeming social value." *Roth v. United States*, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The evidence was offered as tending to prove the publication not obscene under the *Roth-Memoirs* obscenity formulation. The proffer was refused on the ground that, since the trial was proceeding solely on the *Miller* obscenity standard, the evidence was not relevant to any issue presented in the case. Had Petitioner's retrial given him only the benefits of *Miller*, the trial

would have proceeded under both obscenity standards. In this factual setting, the evidence would obviously been relevant and admissible.

In summary, Petitioner, whose appeal was pending when this Court's decision in *Miller* was announced, was entitled to the benefits but not the detriments of the change in the law brought about by *Miller*. By proceeding to retry Petitioner for his pre-*Miller* conduct on the basis of *Miller* obscenity standards, the Court below prejudiced Petitioner precisely as the trial court prejudiced the Petitioners in *Marks, supra.* Since the question presented herein is identical to the question already before this Court for plenary review in *Marks*, certiorari should be granted herein and the case should be set for oral argument in conjunction with *Marks*. Alternatively, this Court may wish to defer decision on this Petition until its decision in *Marks, supra.*

II.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE FIRST, FIFTH, NINTH AND DISTRICT OF COLUMBIA CIRCUITS ON THE ISSUE OF WHETHER, IN OBSCENITY PROSECUTIONS BASED UPON CONDUCT OCCURRING PRIOR TO *MILLER V. CALIFORNIA*, DEFENDANTS ARE ENTITLED TO THE BENEFITS OF THE *ROTH-MEMOIRS* OBSCENITY STANDARD PREVAILING AT THE TIME OF THEIR CONDUCT.

As was presented in the Petition for Writ of Certiorari in *Marks v. United States, supra,* there is a conflict among the Circuit Courts of Appeal upon the issue of the availability of

Roth-Memoirs obscenity standards in trials predicated upon pre-*Miller* conduct. By its decision in this case, the Tenth Circuit Court of Appeals joined the Sixth Circuit in holding that Defendants so situated are not entitled to a trial proceeding upon the *Roth-Memoirs* obscenity formulation.

The propriety of such a course of action has been expressly addressed by United States Courts of Appeal for the First, Fifth, Ninth and District of Columbia Circuits. All of those Courts found such action, in the circumstances presented here, to constitute a denial of due process.

The issue of applying the *Miller* standard retroactively to conduct which occurred prior to the announcement of the *Miller* decision was addressed by the Fifth Circuit Court of Appeals in *United States v. Thevis,* 484 F.2d 1149 (5th Cir. 1973). The trial in *Thevis* had occurred prior to the *Miller* decision and the jury instructions there were thus based upon the *Roth-Memoirs* obscenity formulation. In reviewing the convictions after the *Miller* decision, the Court of Appeals took the *Miller* formulation into account. Since the conduct with which *Thevis* was charged occurred while the *Roth-Memoirs* standard prevailed, however, the Fifth Circuit held that he could not be convicted for any material which did not meet the *Roth-Memoirs* obscenity standard:

> "However, we do believe it to be our duty, under the *Miller* remands and in view of the care with which the judiciary must protect First Amendment rights, to assure that no one is convicted under the earlier extant standards if they are more restrictive pornography than those in *Miller*. Thus when we make, as we are required to do, an 'independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected,'

Jacobellis v. Ohio, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793; United States v. Groner, 5 Cir., 1973, supra, we shall consider both the *Miller* and *Memoirs* definitions of obscenity. Any count based on a magazine which is not obscene under both of these standards is due to be dismissed.

* * * * * * * *

"Since we have ruled that appellants are to receive any protection provided by either applicable standard, their convictions on the six counts based on magazines we find to be protected by *Memoirs* must be reversed. The judgment of conviction as to the other six counts is affirmed." 484 F.2d, at 1155-1157.

The Fifth Circuit decision in *Thevis* was later cited and followed by the First Circuit in *United States v. Palladino*, 490 F.2d 499 (1st Cir. 1974):

> "The defendants are caught in a period of transition, their prosecutions having taken place before the *Miller* decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions. On the other hand, the remand of the entire group of pending obscenity prosecutions suggests to that the extent that *Miller* creates protections and afforded by prior standards, these cannot be denied to persons whose prosecutions have not terminated. Therefore with due regard for First Amendment rights we adopt the position that on remand the material allegedly in violation of 18 U.S.C. § 1461 must be found to be obscene under both the *Miller* and the *Roth-Memoirs* standards or the defendants must be acquitted. *See* United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973)." 490 F.2d, at 500-501.

The decision not to apply the *Miller* standards retroactively was adopted over the dissent of Circuit Judge Aldrich who stated:

> "With all respect, I do not find the Fifth Circuit's decision in United States v. Thevis persuasive." 490 F.2d, at 504.

Unlike the instant case, *Thevis* and *Palladino* involved situations in which both the conduct charged and the trials occurred prior to the *Miller* decision. The precise fact situation here presented – a post-*Miller* trial founded upon pre-*Miller* conduct – was before the Ninth Circuit in *United States v. Jacobs*, 513 F.2d 564 (9th Cir. 1975):

> "Appellant John Andrew Jacobs was indicted, tried and convicted for violation of 18 U.S.C. § 1462 (knowingly receiving an obscene film transported in interstate commerce) after June 23, 1973, the date on which the Supreme Court rendered the decision in *Miller*. The date of the alleged offense, however, was May 10, 1973, before *Miller* was decided." 513 F.2d, at 565.

As in the instant case, the jury in *Jacobs* was instructed on the basis of the *Miller* obscenity standards. The Ninth Circuit reversed the conviction in *Jacobs*, finding that such instructions constituted a due process violation equivalent in effect to an *ex post facto* law:

> "The jury which convicted appellant was instructed using the definition of 'obscenity' enunciated in *Miller*, rather than the *Roth-Memoirs* definition which preceded it. Appellant argues that the *Miller* definition expanded the area of unprotected speech which is now made subject to criminal sanction under § 1462, and that retroactive application of such

expanded standards to his conduct was effectively the application of *ex post facto* law, violating his due process right to notice of the conduct proscribed. As we agree that the *Roth-Memoirs* gloss on 'obscenity' did not give appellant adequate notice that his conduct would be judged by the expanded standard ultimately applied, we reverse his conviction." *Id.*, at 565.

The Court went on to explain the reasoning behind its decision as follows:

"We think that it is beyond controversy that the third prong of the *Miller* test expanded the field of potential criminal liability; indeed, the test was explicitly adopted to ease the prosecutor's burden. *Miller*, at 22, 93 S.Ct. 2607. When appellant received the film, he would have thought the act proscribed if he thought a jury would ultimately decide that the film was 'utterly without redeeming social value.' He could not have known that it was a crime to receive a pruriently interesting film which a jury might later determine to be lacking in 'serious literary, artistic, political or scientific value.' As appellant lacked notice of the subsequent expansion of the statute, due process fairness bars the retroactive judgment of his conduct using the expanded definition, and the conviction cannot stand." *Id.*, at 566.

The same fact situation was later presented to the Fifth Circuit in *United States v. Wasserman*, 504 F.2d 1012 (5th Cir. 1974). The defendants in *Wasserman* were indicted in 1972 for conduct which occurred from 1970 through 1972. Subsequent to their indictment, however, the *Miller* decision was announced and the jury in the *Wasserman* case was instructed on the obscenity definition set forth in *Miller*. In reversing the conviction,

the Fifth Circuit acknowledged and expressly followed the Ninth Circuit decision in *Jacobs:*

"Appellants' position is further supported by United States v. Jacobs (CA 9 1974) the one circuit court opinion deciding the issue of the retroactivity of *Miller*. In *Jacobs* the court held that due process fairness bars the retroactive judgment of his conduct using the expanded definition, and the conviction cannot stand. We think *Jacobs* is correct." 504 F.2d, at 1014-1015.

Precisely the same conclusion was reached by the Court of Appeals for the District of Columbia Circuit in *United States v. Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975). In reversing the convictions, the Court noted:

"At the times appellants distributed and exhibited the film, they could expect to escape conviction unless a jury concluded that the film was 'utterly without redeeming social value.' Since appellants were not afforded the opportunity to conform their behavior to the law as subsequently construed, due process bars the retroactive application of *Miller* test (c), and the instant convictions must be reversed." 512 F.2d, at 1366.

In reaching this decision, the District of Columbia Circuit acknowledge and expressly followed the prior decisions of the Fifth and Ninth Circuits on the same issue:

"The two circuits which have considered this issue have reached similar conclusions regarding the retroactivity of the *Miller* tests. See United States v. Wasserman, 504 F.2d 1012 (5th Cir. 1974); United States v. Jacobs, 513 F.2d 564 (9th Cir. 1974)." *Id.*

It should be noted that other courts, in addition to the Courts of Appeal above noted, have reached results contrary to those arrived at below. *See United States v. Lang*, 361 F. Supp. 380 (C.D. Cal. 1973); *Detco, Inc. v. McCann*, 380 F. Supp. 1366 (E.D. Wis. 1974). *See also, United States v. Cutting*, -- F.2d -- (9th Cir. 1975) (No. 71-2570 decided March 26, 1975). In *Cutting* the Ninth Circuit cited its previous decision in *Jacobs, supra*, and went on to conclude that the applicable standard on review is the community standards which prevailed at the time of the conduct charge

The result below is thus different than that which would obtain in the First, Fifth, Ninth and District of Columbia Circuits. While Petitioner's conviction would have been reversed had it occurred in any of such Circuits, it stands affirmed because of the geographical accident of its occurrence within the Tenth Circuit. The Writ of Certiorari should be granted and the conviction reversed so that Petitioner can be accorded the benefits of the law which would be available to him in other Circuits.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

OF COUNSEL:

JIM MERZ, ESQ.
304 Investors Capital Bldg.
217 North Harvey
Oklahoma City,
Oklahoma 73102
(405) 321-2367

ROBERT EUGENE SMITH, ESQ.
GILBERT H. DEITCH, ESQ.
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 75–1079

UNITED STATES OF AMERICA,
Appellee,

v.

MELVIN FRIEDMAN,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. # CR-71-223)

Filed January 18, 1976

Robert P. Trout, Attorney, Department of Justice (William R. Burkett, United States Attorney, on the brief), for Appellee.

Robert Eugene Smith (Gilbert H. Deitch, and Michael Clutter and Jim Merz, of Counsel, on the brief), for Appellant.

Before PICKETT, SETH and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

Melvin Friedman and Peachtree National Distributors, Inc., were jointly charged in a one-count indictment with knowingly transporting on or about December 10, 1970, and causing to be thus transported in interstate commerce, from Atlanta, Georgia, to Lawton, Oklahoma, for the purpose of sale and distribution, an obscene, lewd, lascivious and filthy book, to wit: a book entitled "The Animal Lovers", in violation of 18 U.S.C. § 1465. Both the individual defendant, Friedman, and the company of which he was the president and active manager were convicted by a jury on November 29, 1971. At trial the court instructed the jury in accord with the definition of obscenity as set forth in the plurality opinion in Memoirs v. Massachusetts, 383 U.S. 413 (1966). Each defendant was fined $5,000 and Friedman was sentenced to thirty months in the custody of the Attorney General.

While these convictions were pending on appeal in this court, the Supreme Court on June 21, 1973, handed down a series of decisions on the issue of obscenity, which decisions will hereinafter be referred to as the *Miller* case.[1] On review we vacated the convictions of both Friedman and his company and remanded the matter to the district court for a new trial. In thus remanding we indicated that there should be a "reconsideration" by the trial court in the light of *Miller*. *See* United States v. Friedman, 488 F.2d 1141 (10th Cir. 1973).

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[1] Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); United States v. 12 200-Ft. Reels of Super 8MM Film, 413 U.S. 123 (1973); and United States v. Rito, 413 U.S. 139 (1973).

Prior to retrial of this matter Peachtree National Distributors, Inc., changed its plea to one of guilty. Friedman proceeded to retrial, and he was again convicted by a jury. This time the trial court instructed the jury in accord with the definition of obscenity as set forth in *Miller*. Friedman was again fined $5,000 and sentenced to thirty months in the custody of the Attorney General. Friedman now appeals his second conviction.

On appeal, Friedman raises essentially three points: (1) the trial court erred in refusing to permit testimony concerning the question as to whether "The Animal Lovers" is "utterly without redeeming social 'value'," and in connection therewith should have instructed the jury on that particular matter in accord with *Memoirs*, and that by instructing the jury in accord with *Miller* violated Friedman's rights under the First, Fifth and Sixth Amendments; (2) assuming that it was proper at the second trial of this matter to instruct the jury in accord with the definition of obscenity as set forth in *Miller*, the instructions given were unclear and confusing and did not "track" with the language of *Miller*, and (3) the trial court erred in admitting certain evidence as bearing on the question of scienter and compounded that error by its instruction on scienter. We find no reversible error and therefore affirm.

Obscenity as defined in Roth v. United States, 354 U.S. 476 (1957), and as redefined in Memoirs v. Massachusetts, 383 U.S. 413 (1966), was supposedly to be measured against the following standards:

> (1) The dominant theme of the material taken as a whole appeals to a prurient interest in sex;
>
> (2) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters;

(3) The material is utterly without redeeming social value.

In *Miller* the Supreme Court stated that the "basic guidelines" to be used by the trier of the fact in determining whether the material in question is obscene under a state statute are as follows:

(1) Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) Whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; and

(3) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

The first two guidelines under both *Memoirs* and *Miller* are substantially the same, and the only real change relates to the so-called third guideline. The majority in *Miller* refused to "adopt" as a constitutional standard the "utterly without redeeming social value" test of *Memoirs.* In thus refusing to "adopt" that particular standard the Supreme Court noted that the "utterly without" standard had never been adopted by a majority of the court, and had been espoused at any one time by only a plurality, three Justices, to be precise. In place of the "utterly without" standard, the majority in *Miller* promulgated the guideline as to whether the work taken as a whole lacks serious literary, artistic, political or scientific value.

As above indicated, the acts relied on by the Government in its prosecution of Friedman occurred in 1970, and he was first tried in 1971. The trial court

instructed the jury in accord with *Roth-Memoirs.* The jury convicted, and the case was pending in this court at the time of the *Miller* decision. It was in this setting that we vacated the convictions of both Friedman and Peachtree and remanded the matter to the trial court for a new trial with the observation that the "recent decisions of the Supreme Court require a reconsideration of the standards applicable to cases of this nature."

On retrial, the trial court refused to allow testimony which Friedman sought to elicit from an assistant professor of English at the University of Oklahoma who had read "The Animal Lovers," and would have, if permitted, expressed the opinion that the book was not "utterly without redeeming social value." And, consistent with that evidentiary ruling, the trial court refused to instruct on the "utterly without" standard of *Memoirs.* In the present appeal, Friedman earnestly contends that his second trial should have been in accord with the definition of obscenity as enunciated in *Memoirs,* and that to apply the *Miller* rule to his pre-*Miller* conduct is a form of retroactivity that violates the spirit, if not the letter, of the ex post facto prohibition in the United States Constitution. We believe this line of argument to be unavailing on several grounds.

In the first place, we deem the law of this case as expressed in our earlier opinion to be that Friedman's second trial be conducted in accord with the *Miller* case. There was of course no reason for us to vacate the earlier conviction and remand the case for a second trial to be conducted in accord with *Memoirs,* since at his first trial he was tried and convicted under the *Memoirs* rule. So, it was patently implicit in our first opinion, if not expressly stated, that retrial should be in accord with *Miller.* In our earlier opinion we recognized that our disposition of Friedman's first appeal was not in accord with decisions of other circuits. Notwithstanding, we did remand for a new trial in the light of *Miller,* and such is now the law of the case.

Furthermore, we have real doubt that even before *Miller* a defendant in an obscenity case had the constitutional right to an instruction which, in effect, would preclude a conviction under 18 U.S.C. § 1465 unless the material in question be found to be "utterly without redeeming social 'value'." As was pointedly observed by the majority of the court in *Miller*, and as was reemphasized in Hamling v. United States, 418 U.S. 87 (1974), the " 'utterly without redeeming social value' test of Memoirs v. Massachusetts, 383 U.S., at 419; . . . has never commanded the adherence of more than three Justices at any one time . . . " That trial courts prior to *Miller* did instruct in an obscenity case on the "utterly without" standard does not necessarily mean that a failure to so instruct would have constituted error of constitutional proportions. Certainly in light of *Miller* such omission would not have been error. In any event, we hold that as of 1970, when Friedman shipped "The Animal Lovers" from Georgia to Oklahoma, he had no right to believe that he could not be convicted under 18 U.S.C. § 1465 unless a jury found that "The Animal Lovers" was "utterly without redeeming social value." Friedman had no right to rely upon a statement to that effect "which had never commanded the adherence of more than three Justices at any one time." A mere plurality pronouncement of this type does not have the binding effect that Friedman argues for. A trial court does not necessarily err when it does not follow a rule promulgated by only three Justices of the Supreme Court. In this regard, *see* United States v. Pink, 315 U.S. 203 (1942), and Hertz v. Woodman, 218 U.S. 205 (1910). *Pink* and *Hertz* stand for the proposition that though an affirmance by the Supreme Court by an equally divided court is conclusive as to the parties then before the court, the principles of law involved therein not having been agreed upon by a majority of the court prevents the case from becoming authority for the resolution of other cases, either in the Supreme Court itself or in an inferior court.

Actually, Friedman has now been convicted by two separate juries under both sets of standards, one jury having been instructed in accord with *Roth-Memoirs* and another jury in accord with *Miller*. Such would appear to us to more than comport with Friedman's due process rights. The objectionable material, a book called "The Animal Lovers," is a part of the record now before us, and in our view the book is obscene judged by any standard. The dominant theme is sex relations between human beings and animals, which is still patently offensive to contemporary community standards, and the book not only has no serious literary or artistic value, but is indeed utterly without redeeming social value. The written word was not deemed sufficient to adequately depict such relationships, and accordingly Peachtree arranged to have the book profusely illustrated. Suffice it to say that in our view "The Animal Lovers" would be considered obscene under any standards, whether it be *Memoirs*, *Miller*, or for that matter even those of ancient Sodom and Gomorrah. *See* United States v. Marks, 520 F.2d 913 (6th Cir. 1975), where the Sixth Circuit on review found the materials there in question to be obscene under either the *Miller* or *Memoirs* standards. We agree with the trial court that "The Animal Lovers" is filth.

Friedman alternatively asserts that the instructions as given by the trial court in his second trial did not square with *Miller* and were unclear and confusing. We disagree. The trial judge attempted to tailor his instructions to the language of *Miller*. It was not necessary to use verbatim language taken from *Miller*. It is sufficient if the instructions of the court accurately and adequately conveyed the "guidelines" expressed in *Miller*. United States v. Hill, 500 F.2d 733 (5th Cir. 1974), *cert. denied*, 420 U.S. 952 (1975). Our study of the instructions, taken in their entirety, leads us to conclude that the jury was adequately instructed in accord with the guidelines of *Miller*.

Friedman's final ground of alleged error concerns the matter of scienter. The scienter required to support a

conviction under 18 U.S.C. § 1465 is not that a defendant such as Friedman actually knew that his book "The Animal Lovers" was obscene under legal standards, but only that he knew the general nature and character of the book. United States v. Hamling, 418 U.S. 87 (1974); Rosen v. United States, 161 U.S. 29 (1896); and United States v. Marks, 520 F.2d 913 (6th Cir. 1975). The facts and circumstances of the instant case are amply sufficient to permit the inference that Friedman knew the general nature of "The Animal Lovers." It was not necessary for the Government in order to prove scienter to establish that Friedman had himself read the book. Friedman was president of Peachtree National Distributors, an Atlanta, Georgia concern. He, along with one other, was in charge of the day-to-day operation of Peachtree, which dealt almost exclusively in pornographic materials. All of the various publications shipped from Georgia to the book store in Lawton, Oklahoma, were of the hard-core variety. In this regard, we find no error in admitting into evidence the other publications shipped by Peachtree to the book dealer in Lawton at about the same time as the delivery of "The Animal Lovers." Such had bearing on scienter. All things considered it would border on the ridiculous to hold that there is insufficient evidence to show scienter on the part of Friedman. To the contrary, the record reeks with scienter. And in our view the instructions to the jury regarding scienter were adequate.

Judgment affirmed.

APPENDIX B

JANUARY TERM – MARCH 15, 1976

Before The Honorable David T. Lewis, Chief Judge, The Honorable John C. Pickett, Senior Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H McWilliams, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

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No. 75–1079

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MELVIN FRIEDMAN,
Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc, as well as the supplemental authority filed by appellant in the captioned cause.

Upon consideration whereof, it is ordered that the petition for rehearing is denied by Circuit Judges Pickett, Seth and McWilliams, to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS,
Clerk

Supreme Court, U. S.
FILED
AUG 13 1976
MICHAEL RODAK, JR., CLE

No. 75-1663

In the Supreme Court of the United States

OCTOBER TERM, 1976

MELVIN FRIEDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MELVIN FRIEDMAN, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner was initially convicted under the obscenity standards of *Roth* v. *United States*, 354 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413. Upon remand in light of the intervening decision in *Miller* v. *California*, 413 U.S. 15, petitioner was convicted under the obscenity standards of that case. Petitioner contends that the application of the *Miller* standards at the second trial constituted a denial of due process.

1. In 1971, after a jury trial in the United States District Court for the Western District of Oklahoma, petitioner and co-defendant Peachtree National Distributors, Inc., were convicted of transporting obscene materials in interstate commerce, in violation of 18 U.S.C. 1465. Petitioner was sentenced to 30 months' imprisonment and a $5,000 fine. The court of appeals vacated and remanded for a new trial in light of the intervening decision

in *Miller* v. *United States*, 413 U.S. 15 (App., *infra*, pp. 6-8; 488 F. 2d 1141). After a second jury trial, held under the *Miller* standards, petitioner was again convicted of transporting obscene materials.[1] He received the same sentence and was required to pay one-half of the trial costs. The court of appeals affirmed (Pet. App. A1-A8; 528 F. 2d 784), and denied rehearing (Pet. App. A9-A10).

At the first trial, the evidence showed that in 1970 petitioner was president of Peachtree National Distributors, Inc., in Atlanta, Georgia (I Tr. 70, 151-152).[2] In December 1970, the company distributed, among other publications, twenty-four copies of a book entitled "The Animal Lovers" to Walt's News and Book Store in Lawton, Oklahoma (I Tr. 13-27). The book, which was introduced at trial (I Tr. 18), explicitly depicts and describes acts of beastiality. An English teacher, a minister, and a psychiatrist testified that the book was written solely as an appeal to the prurient interest, that it exceeds contemporary standards regarding the depiction of sexual matters, and that it has no redeeming social or scientific value (I. Tr. 85, 104-105, 125, 140).

A psychologist, an English teacher, and an applied health sciences teacher testified on petitioner's behalf. They were of the opinion that "The Animal Lovers" does not appeal to the prurient interest, that it does not exceed contemporary community standards regarding descriptions of sexual matters, that it has educational value, and

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[1]Co-defendant Peachtree pleaded guilty prior to the second trial.

[2]"I Tr." refers to the one volume transcript of petitioner's 1971 trial "II Tr." refers to the two-volume transcript of petitioner's 1974 trial.

that it has a pretense of literary merit (I Tr. 182, 190-191, 197, 268-269, 289-290, 322).

The jury was instructed under the *Roth-Memoirs* obscenity standards. Specifically, the jury was told that the book could be found obscene only if the jury found that it appealed to the prurient interest of the average person of the national community, that it was patently offensive under national community standards, and that it was utterly without redeeming social value (I Tr. 403-408).

While petitioner's appeal was pending, this Court announced new constitutional standards for determining obscenity in *Miller* v. *California*, 413 U.S. 15, and related cases.[3] Noting that it was unable to assume that national standards are more lenient than local standards, the court of appeals vacated and remanded for a new trial (App., *infra*).

The government's evidence at the second trial was substantially the same as that submitted at the first trial (II Tr. 16-19, 88-89), although no expert witness testified. The book was introduced at trial (II Tr. 18-19).[4]

A psychologist testified on petitioner's behalf that the book did not appeal to the prurient interest (II Tr. 104). The trial judge rejected petitioners' proffer of testimony by an English teacher that the book is not utterly without social value (II Tr. 117-118).

The jury was instructed under the *Miller* standards that in order to find the book obscene, it must find that it appeals to the prurient interest, is patently offensive

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[3]*Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49; *Kaplan* v. *California*, 413 U.S. 115; *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123; *United States* v. *Orito*, 413 U.S. 139.

[4]The jury was instructed to read the entire book at both trials (I Tr. 256; II Tr. 90-91).

under contemporary community standards, and is without serious literary, artistic, political, or scientific value (II Tr. 157-164).

2. Petitioner contends that the retroactive application of the *Miller* standards to his pre-*Miller* conduct is a denial of due process. We have conceded in our brief in *Marks* v. *United States*, No. 75-708, certiorari granted, March 1, 1976, that *Miller* cannot apply retroactively to a defendant's detriment. In that brief, we reasoned that *Miller* expanded the area of potential liability, and that its retroactive application would expose defendants to criminal liability for conduct that could not have been punished when it occurred, thus depriving them of the fair notice required by the Due Process Clause (Br. 15-32). This case arises in a somewhat different posture than *Marks*. Nevertheless, we submit that it should be governed by the outcome in *Marks*.

After petitioner's first trial the court of appeals should have reviewed the conviction under both *Roth-Memoirs* and *Miller* to determine whether any aspect of the constitutional standard for obscenity as reformulated in *Miller* would have benefited petitioner by materially affecting the deliberations of the jury. *Hamling* v. *United States*, 418 U.S. 87, 102, 108. But the court below, which rendered its initial decision prior to *Hamling*, merely vacated the conviction and remanded for a new trial under *Miller* (App., *infra*; see Pet. App. A2). The vacation of the first conviction and remand for a new trial rendered the first conviction void. *Miller* v. *United States*, 173 F. 2d 922 (C.A. 6); cf. *United States* v. *Ayres*, 9 Wall. 608, 610.

Petitioner's only outstanding conviction for pre-*Miller* conduct, therefore, is based solely upon the *Miller* standards. Accordingly, this case should be held pending the decision in *Marks* and disposed of in accordance therewith.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 72-1143-44 — NOVEMBER 1973 TERM

FILED DECEMBER 11, 1973

HOWARD K. PHILLIPS CLERK,
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, APPELLEE,

v.

MELVIN FRIEDMAN and PEACHTREE NATIONAL DISTRIBUTORS, INC., APPELLANTS.

Appeal From the United States District for the Western District of Oklahoma (D. C. No. CR-71-223)

Before LEWIS, Chief Judge, SETH and McWILLIAMS, Circuit Judges.

PER CURIAM.

Melvin Friedman and Peachtree National Distributors, Inc. appeal from their convictions and sentences for violation of 18 U.S.C. § 1465(2) after a trial to a jury in the United States District Court for the Western District of Oklahoma.

It is our view that the several recent decisions of the Supreme Court require a reconsideration of the standards applicable to cases of this nature. See *Miller* v. *California*, __U.S.__(1973), 41 U.S.L.W. 4925 (June 21, 1973); *United States* v. *Orito*,___U.S.___(1973), 41 U.S.L.W. 4956 (June 21, 1973); *United States* v. *12 200-Ft. Reels of Super 8mm. Film*,____U.S.____(1973), 41 U.S.L.W. 4961 (June 21, 1973).

These decisions, in our opinion, require a reexamination of the facts of this case together with the determination of what may be the applicable standards. We are not unmindful of the decisions of other circuits which hold that remand is not necessary. We are not prepared to hold or assume that in all instances the national standards are more lenient than all local standards. Further there are substantial unresolved questions as to the nature of the proof now required.

The decisions cited above include cases arising under state law and under federal law. The Court did not express itself directly on the application of "community standards" to trials under the federal statute as compared to its statement as to the state laws in *Miller*. See, however, *United States* v. *12 200-Ft. Reels*, Slip Opinion at 7, and the reference therein to "these" standards. *12 200-Ft. Reels* upheld an attack on the constitutionality of 19 U.S.C. § 1350(a), and the Court related the tests under that section to the examples in *Miller*. In *United States* v. *One Reel of Film*, 481 F. 2d 206, the First Circuit considered a post-Miller forfeiture case also under 19 U.S.C. § 1305 as to a film seized upon entry into the country.

The court there applied national standards to the seizure apparently for the very practical reasons expressed in the concurring opinion.

A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be. *See also* United States v. Ewing,__F. 2d__ (Tenth Circuit, No. 638-70), opinion after remand to this court.

Although it is clear that venue in this case was properly laid in the Western District of Oklahoma, 18 U.S.C. §§ 1465, 3237(a); *see* Swisher v. Moseley, 442 F. 2d 1331 (10th Cir.); United States v. Luros, 243 F. Supp. 160 (N.D. Iowa), *rev'd on substantive grounds, sub nom.* Luros v. United States, 389 F. 2d 200 (8th Cir.); *cf.* Gold v. United States, 378 F. 2d 588 (9th Cir.); United States v. Ross, 205 F. 2d 619 (10th Cir.), we query why the case was brought in that district as opposed to another. Considerations of *forum non conveniens* and the interests of justice, *see* Fed. R. Crim. P. 21 (b), and the principles enunciated in United States v. Luros, 243 F. Supp. 160 (N.D. Iowa), would appear to be applicable to such cases as this where a national distributor of "literature" distributes its material throughout the nation. *See* Jones v. Gasch, 404 F. 2d 1231 (D.C. Cir.) (opinion and dissent). We of course express no view on this matter but merely raise the question. It is apparent that this problem will be of increasing importance in cases of this nature in the future.

Accordingly, the judgments of conviction are hereby vacated and the cause is remanded to the district court for a new trial.